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No. 85-282

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE MATURO AND JERALD FRENCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in admitting evidence of a witness's prior consistent statements that responded to a charge of recent fabrication.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3A-4A) is unreported. The oral opinion of the district court (Pet. App. 1A-2A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. A petition for rehearing was denied on June 19, 1985 (Pet. App. 5A). The petition for a writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners Lawrence Maturo and Jerald French were each convicted on one count of theft of property in interstate commerce, in violation of 18 U.S.C. 659; one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371; and one count of

possession of property stolen from interstate commerce, in violation of 18 U.S.C. 659.[1] French was sentenced to four years' imprisonment on the conspiracy count and to a consecutive term of four years' imprisonment on the theft and possession counts, which were merged for purposes of sentencing. Maturo was sentenced to four years' imprisonment on the conspiracy count and to a consecutive term of two years' imprisonment on the merged theft and possession counts.

1. The evidence at trial showed that petitioners Maturo and French conspired with co-conspirators Elliot Gregory and Herman Max Ruth to steal a truck driven by Gregory for the Fantastic Service trucking company of New Jersey (Fantastic) (2 Tr. 42-55, 68-69). In early March 1984, French and Ruth met with Gregory and told him that he could satisfy a several thousand dollar debt to French by helping them steal a truck loaded with merchandise (*id.* at 68-71). On March 19, Fantastic assigned Gregory to drive a truck to Port Newark and Port Elizabeth, New Jersey, to pick up two loads of women's jackets and shoes (*id.* at 75-77). While in Port Elizabeth with the loaded truck, Gregory stopped near a lunch wagon, leaving the truck untended with the engine running. While he stood at the lunch wagon waiting to make a purchase, he was approached by a stranger who told him that "Mack" wanted to see him. Gregory and the stranger crossed the street and entered a car where Herman Max Ruth (Mack) waited. They drove off toward Jersey City. While on the road, Gregory observed his truck, now driven by petitioner French (*id.* at 84-87).

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[1]Prior to petitioners' trial, co-defendant Elliot Gregory pleaded guilty to the conspiracy count and agreed to testify for the government. Co-defendant Herman Max Ruth pleaded guilty on the second day of trial to all three counts.

The car was parked in Jersey City. When the truck passed a few minutes later, Ruth left the car, instructing Gregory to remain seated, and walked off in the direction that the truck had gone. Shortly thereafter, Gregory saw Maturo drive by in the same direction and about 45 minutes later Ruth returned to the parked car, told Gregory that his debt to French was satisfied and instructed him to inform his dispatcher that the truck had been hijacked at gunpoint. Ruth ordered Gregory into the trunk of the car and drove to another location where he released him. Gregory reported to his employer and later to the Port Authority police that his truck had been hijacked (2 Tr. 89-97; 3 Tr. 26; 4 Tr. 69).

The next day, Gregory asked French about the truck. French responded that the truck was near Staten Island, stating further that Maturo was expected to call and report whether he had been able to sell the merchandise (3 Tr. 26-27). The same day, police questioned Gregory again and he agreed to take a polygraph test. When the police informed Gregory that the test results indicated that his story was untrue, Gregory broke down and admitted his involvement in the theft, implicating petitioners and Ruth (4 Tr. 69-71).

Petitioners and Ruth were later arrested. Ruth was apprehended in a truck rented by Maturo that contained some of the stolen goods (4 Tr. 80, 97-99; GX 27, 31, 32). At the time of arrest, Ruth was carrying a security officer's badge belonging to Gregory that had been in the truck on the day it was stolen (3 Tr. 28-30; 4 Tr. 87; GX 1). He also carried an address book containing the telephone numbers of French and Maturo (4 Tr. 80, 87; GX 28). Maturo's car contained a piece of paper with the handwritten name "Jerry," the telephone number of French's mother, and the notations "100 jackets" and "52 shoes" (4 Tr. 118-120; GX 36).

2. In his direct testimony, Gregory admitted that he had lied to the dispatcher and the Port Authority police when he told them that the truck was hijacked (3 Tr. 30-31). He stated that he decided to tell the truth because he "couldn't stand the bearing of lying to my wife and keep lying and keep lying and keep lying" (*id.* at 31). When he failed the polygraph test, he had "a chance to let everything off my chest" and "an opportunity to go ahead on and tell the truth then" (*id.* at 32). He also testified that, after deciding to tell the truth, he spoke to FBI special agents (*id.* at 33).

On cross-examination, Gregory was subject to extensive impeachment concerning his prior inconsistent statements (3 Tr. 64-82, 124-126) and his plea agreement (*id.* at 82-83).[2] On redirect examination, over defense objections, Gregory acknowledged that there were inconsistencies between his statement to the FBI and his testimony at trial and stated that his testimony at trial was truthful (*id.* at 131-133). He also explained why he had become confused when he spoke to the FBI agents (*id.* at 133).

After a hearing (4 Tr. 7-20; see Pet. App. 1A-2A), the court permitted the government to elicit testimony from Gregory on redirect examination showing that Gregory's prior statements—following the polygraph test and his decision to tell the truth—were consistent with his testimony at trial (4 Tr. 29-30).[3] The court ruled that this testimony was relevant and not hearsay under Fed. R. Evid.

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[2]He was also questioned concerning his past false statements, made in a security guard application, claiming that he had no criminal record (3 Tr. 57-58, 61-63, 124).

[3]The government, without defense objection, also elicited brief testimony from a police officer who indicated that Gregory's statements immediately after learning of the polygraph results were consistent with his present testimony (4 Tr. 70-71). The government's only evidence of prior consistent statements was testimonial; it did not offer any writing or transcript into evidence.

801(d)(1)(B)[4] because there was "a strong implication before this jury based upon the cross-examination of Mr. Gregory that there has indeed been a recent fabrication of his testimony and, secondly, that there is indeed a motive for Mr. Gregory to testify falsely" (Pet. App. 1A). The court stated that the relationship between the timing of the prior consistent statement and a motivation to fabricate raised a question of the weight of the evidence—to be determined by the jury—rather than a question of admissibility (*ibid.*). The court of appeals affirmed (Pet. App. 3A-4A).

ARGUMENT

Petitioners claim that evidence of Gregory's prior consistent statements should have been excluded because the statements were made after Gregory had a motive to fabricate. (Pet. 5-6). There is some disagreement among the circuits concerning how the timing of prior consistent statements should affect their admissibility. However, that disagreement is largely academic and presently of insufficient importance to warrant this Court's review. In all events, this case does not truly present the issue. Petitioner's premise (*id.* at 4)—that Gregory's failure to pass the polygraph test created a motive to fabricate—is untenable. And even if the district court erred in admitting the evidence or failing to

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[4]Rule 801(d) provides:

> A statement is not hearsay if—
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> * * * * *
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

give a cautionary instruction, that error could not have affected the outcome of the trial.

1. Before the enactment of the Federal Rules of Evidence, the federal courts admitted prior consistent statements as relevant rehabilitative evidence that could be used to rebut charges of recent fabrication or improper influence. See Fed. R. Evid. 801 advisory committee note. Rule 801(d)(1)(B) expanded that practice, providing that such statements were not hearsay and could thus serve as substantive, as well as rehabilitative, evidence. *Ibid.* As the Advisory Committee stated, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." *Ibid.* The change effected by the Rule is in our view of little practical significance: where the witness has testified, the natural use a jury would make of prior consistent statements is with reference to the witness's credibility, while admission of the statements also as substantive evidence adds little if anything to the substantive evidence already before the jury.

Petitioners are correct insofar as they suggest (Pet. 6-9) that there is some difference of opinion among the courts of appeals as to how Rule 801(d)(1)(B) should be applied in instances where the prior consistent statement was made after a witness developed a motive to fabricate the statement. The Second Circuit has stated that "the proponent must demonstrate that the prior consistent statement was made prior to the time that the supposed motive to falsify arose" in order to avail himself of the rule. *United States* v. *Quinto*, 582 F.2d 224, 234 (2d Cir. 1978). The Ninth Circuit seemingly agrees. *United States* v. *Rohrer*, 708 F.2d 429, 433 (1983). Other courts of appeals, however, have refused for various reasons to recognize *Quinto* as a binding rule. See *United States* v. *Hamilton*, 689 F.2d 1262, 1273 (6th

Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981). Still other circuits have shown some diversity of viewpoints on the *Quinto* rule. Compare *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, No. 83-5718 (Jan. 23, 1984) (seemingly following *Quinto*), with *United States* v. *Parodi*, 703 F.2d 768, 785 (4th Cir. 1983) (refusing to follow *Quinto*); compare *United States* v. *Harris*, 761 F.2d 394, 399-400 (7th Cir.1985) (suggesting that *Quinto's* limitation applies only to the use of prior consistent statements as substantive evidence), with *United States* v. *Baron*, 602 F.2d 1248, 1252-1253 (7th Cir.), cert. denied, 444 U.S. 967 (1979) (suggesting that the admissibility inquiry should focus on relevancy). Finally, Judge Friendly has observed that *Quinto's* rather rigid interpretation of Rule 801(d)(1)(B) pertains only to admission of a prior consistent statement as substantive evidence; it does not affect the traditionally flexible relevancy and "completeness" inquiry governing admission of prior consistent statements for purposes of rehabilitation. *United States* v. *Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring), aff'd on other grounds, 449 U.S. 424 (1981).

Although *Quinto* has generated some difference of opinion, it has not led to divergent results. In all of the cases cited by petitioners save *Quinto* itself, the courts have concluded either that use of the prior consistent statement was permissible despite claims of antecedent fabrication, *e.g.*, *Parry*, 649 F.2d at 296, or that the error was harmless, *e.g.*, *Rohrer*, 708 F.2d at 433. The reason for the uniformity in result is apparent. An objection to admission of a prior consistent statement made after the witness had motive to fabricate relies on the theory that the statement has limited probative value in establishing that the witness's testimony is truthful. See *Quinto*, 582 F.2d at 232. That theory is

debatable.[5] But even if the statement truly has limited probative value, its admission is unlikely to result in any prejudice because the jury can be expected to evaluate and appropriately discount the statement in light of the circumstances in which it was made. Indeed, even the Second Circuit has recognized that admission of prior consistent statements made after a motive to fabricate has arisen may simply amount to harmless error. See *United States* v. *Wilkinson,* 754 F.2d 1427, 1433 (1985); *United States* v. *Rubin,* 609 F.2d at 64. Exceptional circumstances may arise, such as in *Quinto,* where there may be legitimate concern for serious unfair prejudice.[6] But in those cases, the

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[5]For example, admission of a prior consistent statement, made after an alleged motive to fabricate arose, can assist the jury in understanding the whole of the witness's testimony. As the Eighth Circuit stated in *Hanger* v. *United States,* 398 F.2d 91, 105 (1968), cert. denied, 393 U.S. 1119 (1969):

> [I]n the situation where a key witness admittedly changes his story or his recital of important relevant events and admits that his former statements in regard to the proceedings in question were a fabrication, * * * he should be allowed to not only testify as to what he now swears is a true recital of the events, but to also testify as to the reasons for his fabrication and the reasons why he decided to change his story; and all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the jury for its evaluation and determination. Naturally, a person who has made admittedly inconsistent statements stands impeached, but the court and the jury are still charged with the responsibility of ascertaining which evidence is to be credited and only by a full exposure of the relevant and pertinent facts in this difficult situation can the jury make an intelligent and reasonable attempt to ascertain the truth.

[6]*Quinto*'s finding of prejudicial error was premised on the admission of an "eight-page, single-spaced IRS report" (582 F.2d at 235) that described the government's case against Quinto, that appeared "official and authoritative" (*ibid.*) and that "probably became the single most important piece of evidence, testimonial or documentary, against Quinto" (*id.* at 236).

courts that generally would admit the prior consistent statements could presumably exclude them pursuant to Fed. R. Evid. 403.

Thus, while the courts have not been completely uniform in addressing the concerns raised by *Quinto*, their differences are relatively minor and, as a practical matter, do not lead to inconsistency in result. The largely academic disagreement among the circuits on this issue therefore would not warrant this Court's review even if it were squarely presented.

2. In the present case, the district court correctly permitted the government to elicit testimony concerning Gregory's prior consistent statements to rebut petitioners' charges of recent fabrication. The government was entitled to show that Gregory had maintained an essentially consistent story from the time he was confronted with the results of the polygraph test and agreed to tell the truth. When a witness has maintained different versions of the facts at various times, evidence as to when and why the witness altered his story is highly relevant to his credibility. See *Hanger* v. *United States*, 398 F.2d 91, 105 (1968), cert. denied, 393 U.S. 1119 (1969). The jury could not make an intelligent assessment of Gregory's credibility without a complete picture of when and why he changed his version of the facts. See, *e.g.*, *Harris*, 761 F.2d at 399-400; *Parodi*, 703 F.2d at 785-787; *Hamilton*, 689 F.2d at 1273-1274; *Rubin*, 609 F.2d at 66-70 (Friendly, J., concurring).

The district court was correct, even under the *Quinto* rule, in admitting his statements without a cautionary instruction limiting their use. Petitioners contend that *Quinto* would require exclusion of statements Gregory made after he failed the polygraph test because "his motive to fabricate arose at the time he realized his lies to the Port Authority Police would not hold up" (Pet. 4). However,

that statement is plainly a non sequitur. A suspect, told that he has failed a polygraph test, is highly unlikely to respond by giving credence to the polygraph results, admitting that he lied, and then lying once more. Gregory, confronted with polygraph evidence that his original story was untrue, accepted the futility of his fabrications and had no incentive to lie further. Petitioners are therefore mistaken in suggesting that the *Quinto* rule is applicable to the present case.

Even if it be assumed that *Quinto* would have required exclusion of Gregory's prior consistent statements or would have subjected them to a limiting instruction, it is clear that the admission of the evidence did not seriously prejudice petitioners. The government introduced sufficient evidence establishing petitioners' guilt to assure a conviction even in the absence of Gregory's prior consistent statements. The brief testimonial evidence of those statements amounted to only a few pages in a several hundred page transcript (see 4 Tr. 29-30). Under the standards applied by the courts that follow *Quinto,* the error would be considered harmless. See *United States* v. *Wilkinson,* 754 F.2d at 1433; *United States* v. *Rohrer,* 708 F.2d at 433; *United States* v. *Rubin,* 609 F.2d at 64. Unlike the situation in *Quinto,* that evidence did not represent "probably * * * the single most important piece of evidence" against petitioners. *Quinto,* 582 F.2d at 236. And, as previously noted, to the extent petitioners are correct in claiming that the evidence was irrelevant, it equally follows that the jury's decision would not have been affected by its admission. Thus, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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